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OFFICE OF THE GENERAL COUNSEL

MEMORANDUM

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TO: Chief, Dockets Branch

FROM: Associate General Counsel, Litigation Division

SUBJECT: The Alliance for Community Media, The Alliance for Communications Democracy and People for the American Way v. FCC & USA, No. 93-1169. Filing of a new Petition for Review in the United States Court of Appeals for the District of Columbia Circuit.

DATE: March 1, 1993

Docket No(s). MM Docket No. 92-258

File No(s).


This is to advise you that on February 20, 1993, The Alliance for Community Media, The Alliance for Communications Democracy and People for the American Way, filed with the United States Court of Appeals for the District of Columbia Circuit a:

X Section 402(a) Petition for Review
___ Section 402(b) Notice of Appeal

of the following FCC decision: In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, FCC 93-72, released February 3, 1993. Challenge to Section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992 that permits cable operators to enforce voluntarily a written and published policy of prohibiting indecent programming on commercial leased access channels on their systems.

Due to a change in the Communications Act, it will not be necessary to notify the parties of this filing.

The Court has docketed this case as No. 93-1169 and the attorney assigned to handle the litigation of this case is Gregory M. Christopher.


Daniel M. Armstrong

cc: General Counsel
Office of Public Affairs
Shepard's Citations

RECEIVED

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the District of Columbia Circuit

FILED FEB 22 1993

RON GARVIN
CLERK

OFFICE OF GENERAL COUNSEL

The Alliance For Community Media,)
The Alliance For Communications)
Democracy and People For The)
American Way,)

Petitioners,)

v.)

Federal Communications Commission)
and United States of America,)

Respondents.)

93-1169

No. _____

PETITION FOR REVIEW

Pursuant to 47 U.S.C. § 402(a), 28 U.S.C. § 2342(1) and 28 U.S.C. § 2344, the Alliance for Community Media, the Alliance for Communications Democracy and People for the American Way (collectively "Petitioners") hereby petition this Court for review of the Federal Communications Commission's ("Commission") First Report and Order, FCC No. 93-72 (released February 3, 1993 and published in the Federal Register on February 11, 1993) in MM Docket No. 92-258.

Venue in this Court is proper under 28 U.S.C. § 2343. This petition is timely filed under 28 U.S.C. § 2344.

A copy of the Commission's First Report and Order is attached to this Petition.

Parties

The Alliance for Community Media, the Alliance for Communications Democracy and People for the American Way are non-profit corporations that jointly filed an extensive set of comments with the Commission in MM Docket No. 92-258. Their membership is comprised of organizations and individuals who use leased access channels as either programmers or viewers. As such, Petitioners and their members suffer injury from the Commission's First Report and Order in MM Docket No. 92-258, which impinges on their First Amendment rights. By establishing a system of censorship for leased access channels, the Commission has impeded the dissemination of programming over leased access channels and hindered the freedom to view programming over those channels.

The Alliance for Community Media (formerly the National Federation of Local Cable Programmers) is a national membership organization comprised of more than twelve hundred organizations and individuals in more than seven hundred communities. Members include access producers, access center managers and staff members, local cable advisory board members, city cable officials, cable company staff working in community programming, and others involved in local programming around the country. The Alliance for

Community Media assists its members in all aspects of community programming over both leased access channels and other access channels, from production and operations to regulatory oversight.

The Alliance for Communications Democracy is a membership organization comprised of nonprofit access corporations in communities around the country.^{1/} Either alone or through its members, the organization has helped thousands of individuals use the access channels, including leased access channels, that have been established in their communities.

People for the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including first amendment freedoms. Founded in 1980 by a group of religious, civic and education leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. Many of People For's members subscribe to cable television and watch programs on leased access channels. People For's

^{1/} The Board of Directors of the Alliance for Communications Democracy is composed of representatives of access corporations in the following communities: Chicago, Illinois; Montgomery County, Maryland; Boston, Massachusetts; Grand Rapids, Michigan; Manhattan and Staten Island, New York; Columbus, Ohio; Tucson, Arizona; and the State of Hawaii.

members have specific and personal interests in promoting the free flow of information and in receiving uncensored cable programming. People For seeks to protect the interests of its members, as well as the broader interest in preventing censorship of expression protected by the first amendment.

The Commission's First Report and Order

Petitioners seek review of the Commission's First Report and Order in MM Docket No. 92-258, which establishes a system of censorship for leased access programming, as well as the relevant provisions of the statute on which it is based, Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) ("the Act"). Under the Commission's scheme, a program provider requesting access on a leased access channel must certify if its program contains any description of sexual activity that could be considered offensive. Operators may ban such programs, despite the injunction of 47 U.S.C. § 532(c)(2) that "[a] cable operator shall not exercise any editorial control over any video programming provided" over leased access cable channels. If such a program is not banned, it must be segregated onto a separate channel, whose signal is scrambled and will only be unscrambled thirty days after a subscriber's written request.

The Commission's First Report and Order, as well as the implicated portions of Section 10 of the Act, violates the First and Fifth Amendments and is seriously disruptive to leased access programming and the value that it brings to local communities across the country. Moreover, it works this mischief without adding anything to 47 U.S.C.

§ 544(d)(2)(A), the provision of federal law that requires cable operators to make "lockboxes" available to all cable subscribers so that they may lock out any channel or program that they choose. The Commission and the courts have previously recognized that lockboxes are an effective, content-neutral way for parents to prevent their children from being exposed to programming they deem inappropriate. The First Report and Order was also adopted contrary to statute, arbitrarily and capriciously, and in violation of the Administrative Procedures Act.

The Commission has stayed the effectiveness of its First Report and Order, ordering that it not come into effect until "120 days from the date of publication in the Federal Register," or June 11, 1993. First Report and Order, at 34.^{2/} However, the Commission denied

^{2/} Despite the 120-day stay, the Commission ordered that certain requirements of the censorship scheme apply to programmers 90 days after publication in the Federal Register, or May 12, 1993. Id. at 30.

Petitioners' request for a stay pending completion of court review. Id. at 31 n.52. Consequently, Petitioners will be moving this Court pursuant to 47 U.S.C. § 402(c) for the stay that the Commission denied, so that the current status quo will be preserved pending resolution of the grave First Amendment and statutory issues presented by the censorship scheme established in the First Report and Order.

Additional Commission Action

In its MM Docket No. 92-258, the Commission was concerned with more than just leased access. It also proposed a censorship scheme for public, educational and governmental ("PEG") access channels. The Commission has announced that this PEG access censorship scheme will be the subject of a second report and order. Id. at 1-2 n.1. This second order, however, will not be released until some indeterminate time in the future, but within the next 60 days.

Censorship schemes for leased access and PEG access ought to be reviewed together. The Commission itself treated leased access and PEG access together in its Notice of Proposed Rulemaking in MM Docket No. 92-258. Consequently, Petitioners' Comments and Reply Comments, as well as those of all other parties to the rulemaking, treated these two aspects of MM Docket No. 92-258 in tandem. Both of the censorship schemes grow out of Section 10 of the Act,

and much of the constitutional, statutory and legislative history analysis that is germane to one will apply equally to the other.

By issuing the final rules in this docket in separate parts and at different times, the Commission increases the likelihood that, on review, judicial resources will not be applied economically. For example, each censorship scheme could be reviewed by different circuit courts. Even if both were reviewed in the same court of appeals, they could be subject to separate consideration by different panels at different times, despite their general commonality.

In order to promote judicial economy in the consideration of these final rules, Petitioners anticipate filing a second Petition for Review with this Court after the PEG censorship rules are adopted. Petitioners will at that time also seek consolidation of the review of these two portions of the Commission's MM Docket No. 92-258. As will be further discussed in our motion for an interim stay, this context makes it all the more important for this Court to stay the effectiveness of the leased access censorship scheme, for such a stay will promote effective consolidated review of MM Docket No. 92-258.

Conclusion

Petitioners respectfully seek review of the Commission's First Report and Order in MM Docket No. 92-258. The Commission's action fails to pass muster under the Constitution, contradicts the plain language and legislative history of applicable law, and is also arbitrary and capricious.

WHEREFORE, Petitioners respectfully request that this Court:

1. reverse the Commission's First Report and Order in MM Docket No. 92-258;
2. remand this matter to the Commission with instructions to issue a revised decision in the leased access portion of docket No. 92-258, to correctly reflect the requirements of the Constitution and 47 U.S.C. § 532(c)(2);
3. declare unconstitutional the implicated portions of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992;
4. restore 47 U.S.C. § 532 and § 558 to its prior form; and
5. grant all such other relief which may be just and proper.

Respectfully submitted,

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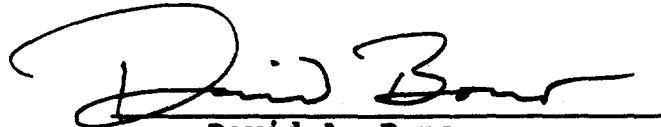
Dated: February 20, 1993

CERTIFICATE OF SERVICE

I, David A. Bono, certify that the foregoing Petition for Review was served by first-class mail, postage prepaid, this 20th day of February, 1993, to the following:

Stewart Gerson
Acting Attorney General
U.S. Department of Justice
Washington, D.C. 20530

James H. Quello
Acting Chairman
Federal Communications Commission
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David A. Bono